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## **ITPG meeting**

**“Are trusts and foundations still useful in your jurisdiction and are there any new obligations?”**

***Roundtable moderated by Prof. Robert Anthony***

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# Alberta, Canada

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## Canadian Trusts & Foundations

	Discretionary Family Trust	Testamentary Trust	Alter Ego Trust	Foreign Asset Income Trust	Charitable Trust	Immigration Trust
<b>Canadian Tax on Contribution of Assets?</b>	Yes	Yes	No	N/A	No	No
<b>Annual Fiscal Filing Obligations ?</b>	Yes	Yes	No	Yes	Yes	Yes
<b>Who is Liable for Taxation if Income Retained?</b>	Trust	Trust	Beneficiary	Trust	No Tax	No Tax
<b>Who is Liable for Taxation if Income Allocated?</b>	Beneficiary	Beneficiary	Beneficiary	Beneficiary	No Tax	No Tax
<b>Top Marginal Tax Rate if Income Retained?</b>	39	39	39	39	0	0
<b>Top Marginal Tax Rate if Income Allocated?</b>	39	39	39	39	0	0
<b>21 Year Rule?</b>	Yes	Yes	Yes	No	No	No

# USA

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

Yes. There is a U.S. gift tax imposed on U.S. domiciliaries who make gifts and on non-U.S. domiciliaries who make gifts of U.S. situs property.

#### - Are there any annual fiscal filing obligations?

Yes, if (1) a trust is a U.S. taxpayer, (2) a trust is a "grantor trust" with a U.S. "grantor" or (3) a trust is not a U.S. taxpayer and does not have a U.S. "grantor" but has "ECI".

#### - Who is liable for the taxation?

The trust or the settlor, depending on whether the trust is a "grantor trust", and beneficiaries, if a trust is not a "grantor trust", to the extent of taxable distributions.

#### - What is the domestic taxation on annual revenue?

Taxable Income	U.S. Rate
\$0 - \$2,300	15%
\$2,301 - \$5,450	25%
\$5,451 - \$8,300	28%
\$8,301 - \$11,350	33%
\$11,351 & Over	35%

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

See above.

#### - Are there any exceptional taxes due?

See below on use of foreign trusts.

## 2/ Estate planning

### - What is the duty on donations to a trust/a foundation?

	Maximum U.S. Gift and GST Tax Rate	Lifetime Exemption for Gift and GST Taxes for U.S. domiciliaries
2012	35%	\$ 5.12 million
2013 <sup>1</sup>	55%	\$ 1 million <sup>2</sup>

<sup>1</sup> Assumes 2013 transfer rates revert to pre-2001 levels.  
<sup>2</sup> GST will be indexed for inflation.

### - What is the taxation or duty on any distributions?

For U.S. gift or estate tax purposes, generally, none, with an exception for a foreign trust created by a "covered expatriate" which makes a distribution to a U.S. taxpayer.

## 3/ General questions

### - Is there any anti avoidance legislation relating to trusts/foundations?

There are a broad range of anti-deferral rules governing foreign trusts created by or for U.S. taxpayers.

### - Can one use foreign trusts/foundations?

Yes, but there are many complicated tax rules to navigate. For example, Internal Revenue Code section 679 (broad rules concerning grantor trust status of foreign trusts created by U.S. persons for U.S. beneficiaries), section 684 (exit tax imposed on trust which becomes a foreign trust) and the "throwback rules". In addition, there is a plethora of enhanced reporting requirements (Form 8938, in addition to the FBAR and Forms 3520 and 3520-A), with further potential reporting if a trust owns an interest in a foreign entity.

### - Are there any important issues one should know?

See above.

### - Have there been in recent years any major changes to domestic legislation or are there any pending changes?

There were major revisions to the U.S. estate and gift tax laws which came into effect in 2011 and are in effect in 2012 concerning rates and exemptions. These provisions will sunset on December 31, 2012 without the passing of new legislation.

In addition, Form 8938 regarding reporting of "specified foreign financial assets", referenced above, came into effect for individuals in 2011 and is expected to come into effect for certain domestic entities in 2012.

Finally, there is a new withholding regime under FATCA which is scheduled to come into effect in 2013.

### - How does domestic legislation interpret trusts/foundations?

Domestic legislation in the United States varies State by State. Generally, trusts are respected if in compliance with governing State law.

# Venezuela

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### Assumptions:

It must be stated that the trusts do not exist in Venezuela as a legal institution. There is a similar institution called the "Fideicomiso". The foundations are legal entities whose purpose can only be of general interest, such as artistic, cultural, literary, social or charity. Therefore, the foundations for private purposes do not exist in our country. Taxation of trusts is very little developed under Venezuelan tax laws.

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

Yes. Any gift of assets is taxable according to the Law of Taxes upon Successions, Gifts and other Related Matters.<sup>1</sup> The beneficiaries of gifts constituted by assets situated in Venezuela must pay a tax. When the law determines whether the assets are to be considered as situated within the national territory, it includes certain extraterritorial situations. According to the law, the following assets are deemed situated in Venezuela:

- a) The shares, obligations and securities issued in Venezuela and those issued outside Venezuela by legal entities incorporated or domiciled in the country.
- b) The shares, obligations and other instruments of credit issued outside Venezuela by foreign legal entities when they are owned by individuals or legal entities domiciled in the country.
- c) The rights or shares which correspond to assets situated in the country.
- d) The personal rights or obligations whose legal origin is in Venezuela.

If the assets are not situated in Venezuela or deemed situated in Venezuela, there is no tax.

Nevertheless, in the case of the trusts, the tax is to be paid upon distribution of the assets by the trustee to the beneficiary, not before.<sup>2</sup>

#### - Are there any annual fiscal filing obligations?

If the assets are constituted by real estate, there is a municipal tax to be paid to the local authorities on the basis of the real property's value, be it a lot of land or a building. As a municipal tax, it may vary from one municipality to another. The tax is established on an annual basis and normally is filed and paid quarterly. The tax payer is the owner of the real estate. Therefore, the trustee or the foundation are liable for the taxes.

If the assets generate an income, the income tax will be filed and paid on an annual basis.

<sup>1</sup> See the answer to the last question of section three *infra*.

<sup>2</sup> Number 2 of article 38 of the Organic Tax Code.

**- Who is liable for the taxation?**

One must distinguish whether we are facing (i) the transfer of the assets from the trustee/foundation to the beneficiary; or (ii) the income produced by the assets before the distribution to the beneficiary is made.

In the first case, the beneficiary is primarily liable for taxation. However, the donor is jointly and severally liable for the payment of the tax obligations.

In the second case, the income produced by the assets transferred to the trustee must be paid by the beneficiaries of the trust. Nevertheless, if the mass of the assets were deemed as the beneficiary of said income, the law provides that the settlor is the owner of the assets. That doesn't prevent that the mass of assets responds for the payment of the income tax.

**- What is the domestic taxation on annual revenue?**

Depending on the fact that the tax payer is an individual or a corporation, the tax rates shall be different. See attachment.

**- Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?**

Already answered with respect to the trusts. Although there is no specific rule for the foundations, one might think that the same rule should apply.

**- Are there any exceptional taxes due?**

No.

**2/ Estate planning**

**- What is the duty on donations to a trust/a foundation?**

**- What is the taxation or duty on any distributions?**

Both questions have already been answered when responding to the first question of Section one *supra*. For the tax rates of the donations, see attachment (letter C).

**3/ General questions**

**- Is there any anti avoidance legislation relating to trusts/foundations?**

Taxpayers who own directly or indirectly (including through the means of trusts and/or foundations), investments in low tax jurisdictions<sup>3</sup>, must submit an annual disclosure statement of the same and must determine the income or tax loss for purposes of taxation.

Generally speaking, since In Venezuela the substance has prevalence over form, the interpretation of the tax law is made in accordance with its economic meaning; contracts and/or legal entities such as trusts and/or foundations can be disregarded if they are clearly inappropriate to the economic reality of the business.

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

There is no prohibition to create foreign trusts or foundations.

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<sup>3</sup> There is a list issued by the Tax Administration stating which countries are considered low tax jurisdictions.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

The tax laws have been very stable during the last ten years. There is always a discussion (not yet resolved) upon the necessity of eliminating the tax on inheritances and gifts.

**- How does domestic legislation interpret trusts/foundations?**

Apart from what have already been said, there is no legal interpretation on trusts/foundations. There are a few rules with respect to Venezuelan foundations: (i) The tax administration can exempt them from the payment of the tax on gifts if their main purpose is scientific, artistic, cultural or they promote the sport, charity and similar objectives. (ii) Generally, they are exempted from the payment of the income tax if they don't distribute dividends, revenues or any other kind of benefit to their founders, associates, members, etc.. However, if they are not exempted, they follow the same regime as the individuals; (iii) Tax payers can deduct as expenses payments made to foundations with certain limits.<sup>4</sup>

**ATTACHMENT:**

**A. Individual Income Tax Rates**

The tax rates for individuals in 2012 are as follows<sup>5</sup>:

<b>TAXABLE INCOME</b>		<b>TAX RATE</b>
UP TO 1,000	TU	6%
1,000-1,500	TU	9%
1,500-2,000	TU	12%
2,000-2,500	TU	16%
2,500-3,000	TU	20%
3,000-4,000	TU	24%
4,000-6,000	TU	29%
OVER 6,000	TU	34%

The Venezuelan legal currency is the Bolivar. However, the tax rates are not determined upon the taxable net income in Bolivars but upon the tax net income calculated in Tax Units ("TU"). The TU is a form of calculating the effect of the inflation on the Venezuelan economy. Each year the value in Bolivars of the TU varies. The value of one TU in 2012 is Bs. 90<sup>6</sup>. In order to calculate the value of the TU the National Assembly (Legislative Power) applies the Consumer Price Index (CPI) of Caracas. The CPI is a statistical indicator, determined by the Central Bank of Venezuela, of the recorded average change during a period of time, in the retail prices of a list of goods and services representing family consumption by the reviewed population. In case the taxable net income is obtained by individuals non residents in Venezuela, the tax rate shall be 34%<sup>7</sup>. An individual is deemed to be nonresident in Venezuela when he/she has spent in a particular year or in the previous year no more than 183 days in the country<sup>8</sup>.

**B. Tax rates for Corporations:**

The tax rates for corporations in 2010 are as follows<sup>9</sup>:

<b>TAXABLE INCOME</b>		<b>TAX RATE</b>
UP TO 2,000	TU	15%
2,000-3,000	TU	22%
OVER 3,000	TU	34%

<sup>4</sup> 10% when the net income doesn't exceed 10,000 TU and 8% for the portion of the net income exceeding 10,000 TU. The net income is calculated before the deduction. For the explanation of the TUs, see the Attachment.

<sup>5</sup> Article 50 of the Tax Income Law.

<sup>6</sup> Article 1 of Administrative Resolution issued by the Tax Administration ("SENIAT") the 16<sup>th</sup> of February 2012.

<sup>7</sup> Sole Paragraph of Article 50 of the Tax Income Law.

<sup>8</sup> Section 1) of Article 1 of the Tax Organic Code.

<sup>9</sup> Article 52 of the Tax Income Law.

**C. Tax rates for Donations:**

The tax rates vary according to the proximity of the beneficiary of the gift with the donor and according to the importance of the value of the gift. The tax rates are the following<sup>10</sup>:

Relation	Up to 15 TU	15.01- 50 TU	50.01- 100 TU	100.01- 250 TU	250.01- 500 TU	500.01- 1.000 TU	1.000.01- 4.000 TU	Over 4.000.01
Ascendants, descendants and spouse	1%	2.50%	5%	7.50%	10%	15%	20%	25%
Brothers/sisters and nephews/nieces representing brothers/sisters previously dead	2.50%	5%	10%	15%	20%	25%	30%	40%
Other collateral relatives (3 <sup>rd</sup> and 4 <sup>th</sup> grade)	6%	12.50%	20%	25%	30%	35%	40%	50%
Relatives by affinity, other relatives, non related people	10%	15%	25%	30%	35%	40%	45%	55%

<sup>10</sup> Article 7 of the Law of Taxes upon Successions, Gifts and other Related Matters.



# Hong Kong

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

No, unless the gifted assets are connected with a trade or business, e.g. if a trade or business gives or donates stock to a trust (not a recognised charitable organization) with nil consideration, the commissioner might ascribe a fair value to the stock and the difference between the fair value and the carrying value of the stock is subject to profits tax.

#### - Are there any annual fiscal filing obligations?

There is no annual filing obligation for a trust. However, if the trust holds assets for income earning in Hong Kong, e.g. a property for rental income, the holder of the property, either a company established by the trust to hold the property or the trustee itself, will be liable to pay profits tax or property tax in Hong Kong. Then, the holder will have annual filing obligations. Please note that only income sourced in Hong Kong is taxable. Income arising in or derived outside Hong Kong is not taxable, e.g. rental income generated from properties owned by a trust outside Hong Kong is not taxable.

#### - Who is liable for the taxation?

The holder of the trust assets. If the trustee directly holds the property for rental income, the trustee is liable for the tax. If a company established by the trust to hold the property, the company under the trust is liable.

#### - What is the domestic taxation on annual revenue?

Income sourced in Hong Kong, e.g. trading profits or rental income, is taxable in Hong Kong. The profits tax rate is 16.5%, and the property tax rate is 15%.

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

Please see answers above. In general, distributions to beneficiary, either income of capital, are not taxable.

#### - Are there any exceptional taxes due?

No.

## 2/ Estate planning

### - What is the duty on donations to a trust/a foundation?

No. Hong Kong has abolished Estate Duty since 2006.

### - What is the taxation or duty on any distributions?

None.

## 3/ General questions

### - Is there any anti avoidance legislation relating to trusts/foundations?

The general anti avoidance rules apply. Otherwise, none.

### - Can one use foreign trusts/foundations? Are there any important issues one should know?

Yes. Hong Kong only tax income arising in or derived from Hong Kong.

### - Have there been in recent years any major changes to domestic legislation or are there any pending changes?

Yes. Hong Kong is going to have an update on the trustee Ordinance for reforming the following areas:

- trustees' statutory duty of care
- short term delegation by a single trustee
- trustees' power to employ nominees, custodians and to insure
- remuneration of professional trustees
- regulation of exemption clauses of professional trustees
- beneficiaries' rights to trust information
- beneficiaries' rights to remove trustees
- abolition or simplification of both the rule against perpetuities and the rule against excessive accumulation of income

### - How does domestic legislation interpret trusts/foundations?

Many of the provisions of the Hong Kong Trustee Ordinance operate on an 'opt out' basis which provides the necessary level of flexibility to settlors and their trustees to establish trusts suitable to their specific needs. The relatively simple trust law in Hong Kong recognizes a trust as being a legitimate vehicle for holding assets for the purpose of confidentiality, asset protection and tax structuring.

# India

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

No, there is no tax on gifting / contributing assets to a family trust where the trust is irrevocable. There is also no tax, if the trust is a "charitable" trust and registered as such with the Tax department. There is no tax on gifting / contributing assets to a foundation, subject to compliance of certain rules.

#### - Are there any annual fiscal filing obligations?

Yes, all trusts and foundations are required to get their books of accounts audited and are also liable to file their tax returns annually.

#### - Who is liable for the taxation?

Depending on the nature of the trust, the liability for taxation is that of the beneficiary, but the tax is paid by the Trustee / the Manager for administrative ease. They can then recover the tax from the beneficiary.

#### - What is the domestic taxation on annual revenue?

The rate of tax is based on the nature of the trust (e.g. irrevocable / discretionary etc.) and is also based on the type of beneficiary (e.g. individual / HUF).

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

As mentioned earlier, the liability for tax is based on the nature of the trust e.g. it is on the beneficiaries if their shares are determinate and in the case of a discretionary trust, the liability is on the trust / trustee itself.

#### - Are there any exceptional taxes due?

No particular exceptional taxes apply to a trust / foundation.

### 2/ Estate planning

#### - What is the duty on donations to a trust/a foundation?

Stamp Duty might be payable based on the nature of assets gifted / transferred to a trust / foundation and based on the state (e.g. Maharashtra, West Bengal etc.) in which these assets lie.

**- What is the taxation or duty on any distributions?**

Tax or Duty payable on distribution by the trust is again based on the type of the trust (irrevocable / discretionary etc.)

**3/ General questions**

**- Is there any anti avoidance legislation relating to trusts/foundations?**

Only General Anti-Avoidance Rules may apply, which are proposed to be introduced in India.

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

Yes, foreign trusts / foundations can be used, subject to the compliances of the rules and regulations of the Foreign Exchange Management Act and rules relating to Anti Money Laundering.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

General Anti Avoidance Rules are proposed to be introduced in India.

**- How does domestic legislation interpret trusts/foundations?**

Domestic tax legislation interprets trusts / foundation as fiscally transparent / pass through.

# UK

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### INTRODUCTION

Whilst UK trusts (i.e. where the trustees are based in the UK) are commonly used in domestic tax planning, these are of limited interest to individuals carrying out cross-border tax planning. The text which follows therefore deals with offshore discretionary trusts, which can beneficially be used for tax planning purposes by UK resident non-domiciled individuals with non-UK assets and by UK non-residents in regard to their UK (and of course if they wish, non-UK) assets.

### UK RESIDENT NON-DOMICILED INDIVIDUALS – A BRIEF EXPLANATION

It is possible for an individual to be UK resident for tax purposes, but not domiciled for tax purposes. To be UK resident for tax purposes, an individual would need to be physically present in the UK for a defined number of days (this paper does not explain further, as to do so is a substantial exercise in itself). To be UK domiciled for tax purposes, an individual would need to consider his permanent home to be in the UK – past, present and future (again the many criteria for determining domicile are beyond the scope of this paper). UK resident non-doms generally only pay UK taxes on their foreign income and foreign gains to the extent that these are brought in to the UK (subject to conditions and exceptions) and, provided they have not been UK tax-resident for more than 16 out of the past 20 years, do not pay inheritance tax (death duties) on their non-UK assets. Resident non-doms therefore typically use offshore trusts to shelter foreign income, gains and assets from UK taxes. If they are likely to become "deemed domiciled" for UK inheritance tax under the "more than 16 out of 20 years" rule, they can place their non-UK assets into a trust. This will protect the assets from the tax, even after the 16 years have passed.

### 1) TAX

#### - Is there taxation on gifting assets to a trust/a foundation?

FOR UK RESIDENT NON-DOMICILIARIES	FOR NON-UK RESIDENTS
Inheritance tax at 20% (the "lifetime charge") on the gifting of UK assets.	None in the UK. Possibly local taxes in country of residence.
No tax on the gifting of foreign assets.	

#### - Are there any annual fiscal filing obligations?

None generally for the trust itself, unless it has reportable UK income (e.g. rent received). UK resident non-dom individuals may need to report trust income and gains to the extent that these are matched by distributions to the individuals.

**- Who is liable for the taxation?**

UK resident non-dom beneficiaries may be liable for income tax and/or capital gains tax on distributions receivable by them.

**- What is the domestic taxation on annual revenue?**

None generally on the trust but as per the above, possible income tax on UK resident beneficiaries matched to distributions to such individuals.

**- Who is liable to taxation?**

As above, for distributions matched with income or capital gains, the beneficiaries may be liable for related income tax and capital gains tax.

**- Are there any exceptional taxes due?**

The trust is liable to an inheritance tax charge on its net UK assets (i.e. UK liabilities may be deducted). The rate is 6% and the tax is charged on the 10th anniversary of the trust and every 10 years thereafter. This tax is payable by the trustees.

It is for this reason that UK assets are typically held by offshore companies, which in turn are owned by a trust. As a result, the assets would be outside the scope of this tax.

**2) ESTATE PLANNING**

**- What is the duty on donations to a trust?**

There is no duty on donations to a trust. However, see above re the lifetime inheritance tax charge of 20% for donations by UK residents.

**- What is the taxation or duty on any distributions?**

See above re income tax or capital gains tax on the beneficiaries of distributions where these are matched.

**3) GENERAL QUESTIONS**

**- Is there any anti avoidance legislation relating to trusts?**

UK anti-avoidance rules do exist, and the general effect of these rules is to attribute in certain circumstances the income and capital gains of non-UK trusts, and sometimes their underlying offshore companies, to settlors and beneficiaries resident in the UK:

- The income of the trustees can be taxed on the settlor if the settlor or spouse has an interest in the income or capital of the trust.
- Under what are known as the "transfer of assets" rules, not only can the income of non-UK trusts be attributed to the settlor but also the income of underlying offshore companies.
- If these rules do not attribute the income of non-UK trusts and underlying companies to the settlor, then the accumulated income of such trusts and underlying companies can be matched with distributions paid to UK beneficiaries and taxed on them.

- Capital gains of the trust and underlying companies can be matched with distributions to UK beneficiaries and taxed on them.

In appropriate circumstances, and if the parties are correctly advised, then such provisions can be avoided in an entirely proper and legal manner.

**- Can one use foreign trusts/foundations?**

Indeed non-UK trusts/foundations are an integral part of UK tax planning for resident non-doms and for non-residents investing into the UK. To turn the question around, UK trusts by contrast are fully taxed in the UK and are therefore of far less importance in cross-border tax planning.

**- Are there any important issues one should know?**

For non-UK trusts it is critical that the trust is properly managed and controlled by the non-UK trustees. Undue influence or interference by the client can lead to the trust being considered by the authorities to be a sham. This in turn can have adverse UK tax consequences for the client if he is resident in the UK or in the country of residence if elsewhere.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

Consultation has taken place in regard to the ownership by corporate trustees of a trust, of UK residential property valued at more than GBP2million. It is intended that the sale of such properties will from April 2013 become subject to capital gains tax. Draft legislation is currently awaited and therefore at this stage certain critical elements of this are uncertain or unknown. Examples are the rate of capital gains tax, and also the relevant cost of the property for the purposes of the calculation of the gain.

**- How does domestic legislation interpret trusts/foundations?**

Critically, whilst the UK recognises the existence and concept of trusts, it does not recognise the trust as a legal entity. Rather, it considers the trust to be an arrangement between the settlor and the trustees, whereby the trustees will become the guardians of the trust's assets. All transactions of a trust are carried out in the name of the trustees. Similarly the trust's assets and liabilities are all in the name of the trustees.

That said, trusts play a highly important and valuable role in cross-border tax planning in the UK.

# France

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

France passed legislation in obliging from July 2011 to file a declaration dated 30.9.2012. This details assets in, France, the settlor and beneficiaries.

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

Depends on the tax residence and whether the assets immovable French assets.

#### - are there any annual fiscal filing obligations?

Yes.

#### - Who is liable for the taxation?

Whilst alive the constituent on death the beneficiaries.

#### - What is the domestic taxation on annual revenue?

Depends on the source and nature of income.

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

Depends on if the constituent is alive. They are in the first place joint and severally with the trustee. On death the beneficiary which is French resident of has assets in France.

#### - Are there any exceptional taxes due?

Yes wealth tax of 0.5 % per year.

### 2/ Estate planning

#### - What is the duty on donations to a trust/a foundation?

Depends on relationship and residency and nature of the trust. There is a difference in Life and interest and a discretionary trust.

#### - What is the taxation or duty on any distributions?

In France, generally 60%



### **3/ General questions**

**- Is there any anti avoidance legislation relating to trusts/foundations?**

Yes new trust law forcing disclosure of resident assets or settlors/ beneficiaries.

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

Yes as there is no domestic French trust. Wealth tax for French residents is an issue.  
Foundations and trust are interpreted in the same way.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

Yes, 2012.

**- How does domestic legislation interpret trusts/foundations?**

They are recognised but have reporting requirements for French assets or French residents.

# Switzerland

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

IF FOUNDATION IS TAX EXEMPTED (WHICH CAN BE EASILY OBTAINED IF FOUNDATION HAS A CHARITABLE PURPOSE), THEN THERE IS NO TAXATION AT FOUNDATION LEVEL. DONORS CAN ONLY DEDUCT A CERTAIN MAXIMUM FROM THEIR TAXABLE INCOME, THE TAX AMOUNT IS VARIABLE FROM CANTON TO CANTON.

#### - Are there any annual fiscal filing obligations?

NOT FOR THE FOUNDATION. EVERY 2 YEARS A QUESTIONNAIRE MUST BE FILED.

#### - Who is liable for the taxation?

#### - What is the domestic taxation on annual revenue?

N/A

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

NO TRUSTS IN SWITZERLAND, ONLY FOUNDATIONS.

#### - Are there any exceptional taxes due?

N/A

### 2/ Estate planning

#### - What is the duty on donations to a trust/a foundation?

NONE IN SOME CANTONS, AND SOME TAXATION IN OTHERS. WE HAVE 26 DIFFERENT TAX TARIFFS IN SWITZERLAND.

#### - What is the taxation or duty on any distributions?

### 3/ General questions

#### - Is there any anti avoidance legislation relating to trusts/foundations?

YES, EVIDENCE OF FULFILLING CHARITABLE PURPOSE IS KEY.

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

BASICALLY YES, TAX CONSEQUENCES ARE HOWEVER ALMOST 100% GIVEN:

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

NO; LAW ABOUT FOUNDATIONS HAS BEEN THE SAME FOR OVER 100 YEARS IN SWITZERLAND.

**- How does domestic legislation interpret trusts/foundations?**

TRUST DO NOT "EXIST". FOUNDATIONS ARE CONSIDERED AS STAND-ALONE LEGAL ENTITIES.

# Germany

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## Questionnaire

“Are trusts and foundations still useful in your jurisdiction and are there any new obligations?”

### **Are trusts and foundations still useful in your jurisdiction and are there any new obligations?**

#### **Trusts:**

In the German jurisdiction exist no trusts in the sense of the English/Anglo-American law.

Since 2007 you have the possibility to found “Real Estate Investment Trusts” in Germany but these companies are listed joint stock corporations. Therefore the following explanations only refer to foundations.

#### **Foundations:**

There is a great variety of foundations in Germany. A foundation can be created to pursue every legal purpose – be it private or public benefit.

In the last years a strong growth can be identified in the sector of the foundations in Germany. They increased at round about 1.000 per year and it is estimated that there are circa 16.400 in Germany.

## 1. Tax

### **a) Is there taxation on gifting assets to a trust/a foundation?**

#### **Establishing a tax privileged foundation (public-benefit purpose foundations):**

In general donations are exempt from corporate or income tax and also from gift and inheritance tax.

Concerning VAT one has to distinguish between the sale of an enterprise as a whole and the donation of single assets. If the founder gives his whole enterprise to the foundation, than the donation will be without VAT. If there are only single assets the founder will have to pay VAT for the donations.

#### **Establishing a non tax privileged foundation or family foundation:**

If the founder gives his whole enterprise or independent division of his business to the foundation than this act will be exempt from income tax. If the founder gives single assets of his company or shares hold in his company to a foundation, he will have to pay income tax.

Concerning VAT: see above

In general the foundation has to pay high gift and inheritance tax for single assets donated to the foundation (unfavourable tax class III). If one founds a family foundation than the tax class depends on how close the beneficiary is related with the founder. Relevant for the taxation is the tax class of that beneficiary who is the most distant relative. Therefore in the

statutes of the foundation only beneficiaries with the favourable tax class I should be considered.

This favourable tax class you only get by establishing the foundation. For later donations the foundation has to pay tax according to the unfavourable tax class III.

If the donation is a whole enterprise or independent division of a business or shares of more than 25 %, there are tax exemptions for gift and inheritance tax under certain circumstances for non tax privileged and family foundations.

**b) Are there any annual fiscal filing obligations?**

**Public-benefit purpose foundation:**

No annual obligations but normally every 3 years you have to file in for the past 3 years.

**Non tax privileged foundation and family foundation:**

Yes, there is an annual fiscal filing obligation:

- for corporate tax
- for local trade tax (Gewerbsteuer) for business income

A family foundation has to pay all 30 years a special inheritance tax (Erbersatzsteuer).

**For all foundations:**

VAT annual filing obligations according to the general rules.

**c) Who is liable for the taxation?**

For the yearly corporate tax and local trade tax the foundation is tax debtor.

**d) What is the domestic taxation on annual revenue?**

- 15 % corporate tax
- 5,5 % of the corporate tax as solidarity surcharge (Solidaritatzuschlag)
- 7 % – 17 % local trade tax (depending where the foundation is located)

**e) Who is liable to taxation? For foundations: the constituent, the manager or the beneficiaries?**

Constituent/founder:  
See above.

Manager:  
The manager fills in the tax declarations for the foundation.

Beneficiaries:  
If a beneficiary gets payments because of the statutes of the foundation, he has to pay income tax for these.

**f) Are there any exceptional taxes due?**

The family foundation has to pay a special inheritance tax (Erbersatzsteuer) every 30 years. Other private foundations or public-benefit purpose foundations don't have to pay this special inheritance tax.

## 2. Estate planning

### a) What is the duty on donations to a trust/a foundation?

See explanations above.

+ land transfer tax is not to pay (tax exemption)

### b) What is the taxation or duty on any distributions?

For distributions to beneficiaries the foundation has to pay settlement tax (withholding tax on capital) with a rate of 25 %. The distributions do not reduce the income of the foundation.

## 3. General questions

### a) Is there any anti avoidance legislation relating to trusts/foundations?

- § 15 Außensteuergesetz:

§ 15 Außensteuergesetz says:

The net income of foreign family foundations or trusts is attributed to the founder or beneficiaries for tax purposes in Germany, if the founder or beneficiary is regular liable to income tax in Germany.

Even if there are no distributions one has to pay tax.

For family foundations with seat in the EU exists an escape-clause (§ 15 Abs. 6 Außensteuergesetz) with certain restrictions.

- § 42 Abgabenordnung:

§ 42 Abgabenordnung is the general principle/rule in Germany concerning anti avoidance. It says: Because of the improper use of legal arrangements the tax law cannot be avoided.

- Double tax treaty avoidance clauses:

In most of its double tax treaties Germany has avoidance clauses about non-taxation in the other country. If this is the case, Germany has the right to tax.

### b) Can one use foreign trusts/foundations? Are there any important issues one should know?

One can use foreign trusts and foundations, but you will have to take § 15 Außensteuergesetz into consideration.

### c) Have there been in recent years any major changes to domestic legislation or are there any pending changes?

The tax legislation is planning to change § 15 Außensteuergesetz. One change is that the taxable income of foreign family foundations and trusts which is attributed to the founder or beneficiaries will be increased. Therefore the definition of taxable income will be altered.

Because of Community law there exists an escape-clause in § 15 Außensteuergesetz. It is planned that this clause will be restricted from 2013 on.

There are planned some more alterations in § 15 Außensteuergesetz.

But in Germany a discussion has already started that these changes disregard the European Community law.

**d) How does domestic legislation interpret trusts/foundations?**

German foundations are independent conglomerations of property without shareholders. Important is the will/intention of the founder. Normally the life span of the foundation is unlimited.

# Netherlands

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

In our answers we will focus on trusts/foundations that are primarily set up for personal estate planning purposes. The majority of trusts and foundations that were set up for such purposes qualify as a "separated private assets fund" (hereafter: SPA). Specific tax rules apply to such funds.

#### 1. Transparent SPA

An SPA is in principle regarded as transparent for tax purposes. The assets in an SPA will either be attributed to the contributor or to the beneficiaries of the SPA.

If the beneficiaries obtain an irrevocable claim on the assets of the SPA, the contribution will qualify as a gift from the contributor directly to the beneficiaries and gift tax will be applicable. The Dutch beneficiaries would also have to include their claim in their individual income tax basis (generally taxed effectively at 1.2% on the value of the net assets owned per January 1 of each year).

If the beneficiaries do not obtain an irrevocable claim on the assets of the SPA, the contribution will not be treated as a gift. Instead, the assets would still be regarded to be owned by the contributor until the contributor dies. As of that moment, the assets and income would be attributed to the beneficiaries.

#### 2. Non-Transparent SPA

The SPA is not treated as transparent if its income at the level of the SPA is taxed at a rate of at least 10%. When this is the fact, no income tax is levied from the contributor and not from the beneficiaries if they do not have an irrevocable claim on the assets/income of the SPA.

With respect to gift tax/inheritance tax, the assets would be regarded not to be given to the beneficiaries as long as they do not have an irrevocable right on the assets of the SPA. Gift tax would be due when they do receive assets from the SPA. Inheritance tax would be due as soon as the contributor would die.

Below we continue with the assumption that we are dealing with a transparent SPA.



**- are there any annual fiscal filing obligations?**

Because of the transparency for tax purposes, the assets of an SPA will be either attributable to the contributor or to the beneficiaries, who should include the assets/income in their tax filings as if they would be their own. The SPA would generally not have any filing obligations in The Netherlands as it is considered to be transparent for tax purposes.

**- Who is liable for the taxation?**

The contributor or the beneficiaries, as the SPA is considered transparent.

**- What is the domestic taxation on annual revenue?**

If assets are held through an SPA, taxation will occur on the level of the contributor or the beneficiaries as if they would own the assets or receive the income themselves.

At the level of individuals, wealth is generally taxable at effectively 1.2% of the value present at January 1 of each year.

**- Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?**

The contributor or the beneficiaries as the SPA is considered transparent. Generally the beneficiary is liable to taxation.

**- Are there any exceptional taxes due?**

Yes, the above are rules that are specific for SPA's.

## **2/ Estate planning**

**- What is the duty on donations to a trust/a foundation?**

If the contributor still has power to manage the equity of the SPA, the donation will not be taxable (see above). If the beneficiaries get an irrevocable claim on the SPA, the contributor will be deemed to have donated to the beneficiaries and gift tax will be applicable. The rates for gift tax go from 10%/20% up to 40% depending on amount and relationship with the donor or deceased.

**- What is the taxation or duty on any distributions?**

A distribution from an SPA will be taxable with gift tax or with inheritance tax. The rates for both taxes go from 10%/20% up to 40%. Inheritance tax will be applicable after the death of the contributor if the beneficiaries did not have already an irrevocable claim on the SPA.

## **3/ General questions**

**- Is there any anti avoidance legislation relating to trusts/foundations?**

Yes, as of 2010, SPA's are regarded to be transparent for tax purposes (see above). The Dutch tax authorities are actively chasing structures including SPA's (trusts/foundations).

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

One can use foreign trusts/foundations, but the anti-avoidance legislation is also applicable for foreign trusts/foundations. Currently trust/foundation structures are therefore not popular anymore.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

Yes, before 2010, distributions from a foreign trust could be exempt from taxation. As of 2010 this is no longer possible.

**- How does domestic legislation interpret trusts/foundations?**

An SPA can be the legal owner of assets, but is regarded as a transparent entity for tax purposes (see above).

# Spain

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

Yes, if the gift is situated in Spain, than income tax for no residents applies. The actual tax rate is 24.75%.

#### - are there any annual fiscal filing obligations?

Yes, if the property is situated in Spain, the foreign trust or foundation has to file every year a tax return and pay a flat tax of 3% on tax value (valor catastral) of real estate. Other assets in Spain (bank accounts, shares, etc.) are not subject to taxation, unless they produce revenue.

#### - Who is liable for the taxation?

The trust or foundation is liable for taxation, but it must appoint a fiscal representative in Spain, who is jointly liable for the tax.

#### - What is the domestic taxation on annual revenue?

If the trust has a permanent establishment in Spain, than the tax rate is 30%. Otherwise the tax rate is 24.75% (rental income, financial income, etc.).

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

Both the trustee and the beneficiary are jointly liable for the tax. In case of foundations, the foundation itself and the beneficiary are also jointly liable.

#### - Are there any exceptional taxes due?

If the trust holds real estate than ground tax is also yearly due.

### 2/ Estate planning

#### - What is the duty on donations to a trust/a foundation?

If the gift is situated in Spain (real estate or shares of a Spanish company), than income tax for no residents applies. The actual tax rate is 24.75%.

**- What is the taxation or duty on any distributions?**

Distributions from the trust to a beneficiary residing in Spain are subject to income tax at the progressive tax rate (52% to 57% depending of the region).

**3/ General questions**

**- Is there any anti avoidance legislation relating to trusts/foundations?**

There is no special legislation, but the trust/foundation is considered a tax subject if the property is physically in Spain. If the beneficiary is resident in Spain, than the trust or foundation could be considered transparent, unless it is proved that the trust/foundation is subject to tax in its country of establishment.

**- Can one use foreign trusts/foundations? Are there any important issues one should know?**

Trust and foundations can be used in Spain, but they are taxed as non residents.

**- Have there been in recent years any major changes to domestic legislation or are there any pending changes?**

No.

**- How does domestic legislation interpret trusts/foundations?**

They are considered transparent, unless it is proved that the trust/foundation is subject to tax in its country of establishment. Otherwise the beneficial owner is taxed directly in Spain as any other tax subject.

# Italy

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## Questionnaire

"Are trusts and foundations still useful in your jurisdiction and are there any new obligations?"

### 1/ Tax

#### - Is there taxation on gifting assets to a trust/a foundation?

Gifting assets to a trust/a foundation is subject to 8% gift tax.

If beneficiaries of the trust are legal heirs gift tax reduction for families are applicable under specified circumstances.

According to Italian law a foundation can only be incorporated as charity with legal personality: on the basis of the purposes of the foundation exemption of gift tax can be allowed.

Other foundations (for example foreign family foundations) are considered generically "other institutions" for tax purposes and the same tax rules of trusts are applicable.

#### - Are there any annual fiscal filing obligations?

Every year income tax return must be filed with the Tax Authority.

#### - Who is liable for the taxation?

The trust itself is liable for taxation and, only if beneficiaries are identified and have a right to the distribution of incomes, taxation is charged to them on the basis of their income's share calculated by the trust.

When real estate is transferred to a trust capital gain taxation may arise for the settler if he is acting as entrepreneur.

#### - What is the domestic taxation on annual revenue?

Annual revenue is subject to 27,5 corporate tax (IRES).

If business activities are carried on by the trust 3,9% regional tax (IRAP) is levied.

#### - Who is liable to taxation? For trusts: the trustee, the beneficiary or the settlor? For foundations: the constituent, the manager or the beneficiaries?

For trusts: the trustee, considered as the director.

#### - Are there any exceptional taxes due?

No.

## 2/ Estate planning

### - What is the duty on donations to a trust/a foundation?

When real estate is donated to a trust donation is subject to 8% gift tax, 2% mortgage tax and 1% cadastral duties

If beneficiaries of the trust are legal heirs gift tax reduction for families are applicable under specified circumstances.

Only if a foundation can be considered a charity fixed rate taxes or duties are levied.

### - What is the taxation or duty on any distributions?

Transfer of property of real estate to beneficiaries is subject to ordinary 7% registration duty, 2% mortgage tax and 1% cadastral duties.

In case of trusts with beneficiary identified in the incorporation deed no registration duty is due.

## 3/ General questions

### - Is there any anti avoidance legislation relating to trusts/foundations?

Trust established in black list countries in which at least one of the settlers or one of the beneficiaries is resident of Italy are considered resident of Italy for tax purposes except when differently proved.

Trust established in black list countries are considered resident of Italy for tax purposes when after the incorporation receive real estate by a resident of Italy.

Foreign income received by identified beneficiary of a foreign trust resident of Italy is taxable in Italy.

### - Can one use foreign trusts/foundations? Are there any important issues one should know?

Trust can be used in Italy thanks to the adoption of The Hague Convention (1st July 1985) executive from 1st January 1992.

According to Italian law a foundation can only be incorporated as charity with legal personality.

### - Have there been in recent years any major changes to domestic legislation or are there any pending changes?

Relevant changes in income taxation are applicable from year 2007.

### - How does domestic legislation interpret trusts/foundations?

Italy has no complete and organic regulation on Trust.

Domestic trusts can be established only referring to foreign regulations.

According to Italian law a foundation can only be incorporated as charity with legal personality.

Foreign foundations can be considered as domestic foundations (charities) only according to reciprocity rules and tax advantages can therefore be applied.